In The
UNITED STATES DISTRICT COURT
Eastern District of Tennessee
Southern Division

DEERING MILLIKEN RESEARCH CORP.,
Plaintiff,

vs.

ELECTRIC FURNACE CORPORATION,
Defendant.

ELECTRIC FURNACE CORPORATION,
Cross-Plaintiff,

vs.

DEERING MILLIKEN RESEARCH CORP.,
Cross-Defendant.

} CIVIL NO. 2700

OPINION

(Filed March 16, 1965)

This lawsuit involves an action for libel and is now before the Court upon the motion of the defendant for judgment notwithstanding the verdict or in the alternate for a new trial. Upon the trial of the case the jury returned a verdict for the plaintiff, awarding the plaintiff compensatory

damages in the sum of $20,000.00 and punitive damages in the sum of $50,000.00. This is the second time the case has been tried. Upon the first trial the plaintiff also obtained a verdict but in a lesser sum. Upon appeal that verdict was set aside and the case was remanded for a new trial upon the ground that the proof was inadequate with reference to damages. *Electric Furnace Corporation v. Deering-Milliken Research Corporation*, 325 F. 2d 761. The background of the case is set forth in the opinion upon appeal. The motion for judgment n.o.v. is based upon the ground that there is no evidence upon the retrial of this case of actionable libel and no evidence of damage proximately resulting from a libel. With regard to the evidence upon the issue of libel, it was in all material respects the same in this trial as upon the former trial, which in turn was held to be sufficient to go to the jury. The problem to which the Court will direct its attention with respect to the motion for judgment n.o.v. will therefore be as to the sufficiency of the evidence to establish a jury issue with respect to damages.

Since the defamatory nature of the letter complained of does not appear from the face of the letter, but could only appear from all of the surrounding circumstances, the letter could not be libelous per se but only libelous per quod. The jury was so instructed. The plaintiff would therefore be required to plead and prove special damages proximately resulting from the libel in order to be entitled to recover under the Tennessee law of libel. See *Electric Furnace Corp. v. Deering-Milliken Research Corp.*, supra, and cases cited therein at headnote #2.

Upon the issue of damages proximately flowing from the libelous letter, the plaintiff introduced testimony that the libelous letter had been sent to all of its customers by

the defendant and that it had in turn received letters from four of its customers advising of their receipt of the Deering-Milliken letter and calling upon the plaintiff for some explanation or assurance. (Exhibits 11, 12, 13 and 14. These letters were objected to by the defendant upon the ground of relevancy only and the objection was overruled.) In addition, Mr. Livingstone testified that although he had received business from the Lowenstein group of mills before the libelous letter was sent to them, their business with the plaintiff stopped after the letter was received and was not resumed until he had made a personal visit to see their purchasing agent, a Mr. Belshear, and had reassured him of the facts with regard to the letter, whereupon the Lowenstein group of mills resumed doing business with Electric Furnace Corporation. Mr. Belshear testified to having received the letter and that he "needed assurance for my company" before continuing to do business with Electric Furnace Corporation.

There is testimony in the record that in an effort to mitigate or overcome any damage from the libelous letter, the plaintiff wrote a letter of explanation to all of its customers who had received the libelous letter, and that in doing so it incurred expense of $20.00 for mimeographing and $5.00 for postage. In a further effort to mitigate or overcome the damage, the plaintiff testified that it incurred $814.36 in travel expense in making personal calls upon its more important customers to explain the letter and to retain their business. Of this sum $315.75 was incurred in visiting Levi and Pepperell, two major customers of the plaintiff who had received the defamatory letter.

The plaintiff introduced further testimony that during the first eight months of 1956, before the defendant had sent the letter complained of, it coated 6,280 filling grates,

upon which it made a profit of $942.00, but that in the last four months of 1956, after the letter had been sent, it received orders for coating only 1100 filling grates, upon which it made a profit of only $165.00, and in 1957 its business declined to 4,109 filling grates, upon which it made a profit of $620.00. There is testimony that while the plaintiff had orders for filling grates from 17 customers in the first eight months of 1956, it received only one order during the balance of the year following the sending of the letter by the defendant in September of 1956. (In this regard there was further testimony in the record that the number of customers had declined each year since 1954 and that a piece of equipment designated as a "center fork" was replacing the filling grate in the textile industry during this period, but in reviewing the testimony for the present purposes, the Court must look to the testimony in the light most favorable to the plaintiff.)

There is further testimony in the record that the plaintiff's business in categories other than in the coating of filling grates declined after the libelous letter was sent, the testimony being that while it made gross sales of $28,000.00 in coating sliver guides for its customers in 1956, upon which it made a profit of $14,300.00, the volume of this business declined in 1957 to a gross of $8,000.00, upon which it made a net profit of $4,000.00, this decline in business being from the same customers who had received the libelous letter and being in an area where the defendant was making no patent claims nor threatening any patent action against the customers.

The issue before the Court is whether, upon the above state of the record, there is any evidence of "special damage" proximately resulting from the alleged libelous letter. The only authority cited the Court in the defendant's brief

is the opinion of the Court of Appeals in the former trial. The only authority cited by the plaintiff in its brief is a quotation from an article by Professor Prosser in which he expresses a preference for a more liberal rule in proving special damages in an injurious falsehood action.

Jurisdiction in this case being based upon diversity, the Court must look to the law of Tennessee in deciding the issue of special damages. *Erie RR Co. v. Thompkins*, 304 U.S. 64. The rule of conflicts of law in this regard is that either the law of the forum or the law of the domicile of the plaintiff would apply, which in either event is the law of Tennessee under the facts of this case. Goodrich, *Conflicts of Law*, Sec. 93.

In other jurisdictions the law with reference to proof of special damage appears to permit the plaintiff, where the situation is such that he could only know that the general flow of his business was so much before the defamation and had been diminished by so much after the publication of the defamation, and it would be impossible to point to any specific customer or orders that have been lost, then it is sufficient to plead and prove the total loss generally, even where libel per quod, and not libel per se, is involved. *McCormick on Damages*, Sec. 115; *Dale System v. Time, Inc.*, 116 F. Supp. 527 (U.S. D.C., Conn. 1953). (For a leading case upon this see *Ratcliff v. Evans*, L.R. (1892) 2 Q.B. 525.) However, the law in Tennessee with reference to proof of special damage for a libel per quod case appears to be established in the case of *Fry v. McCord Bros.*, 95 Tenn. 678, where at page 688 the Court stated:

> "The fourth count was stricken out on demurrer. As to what constitutes special damage, and what is meant by special damage, has been the subject of much

adjudication. It is said 'special damages are such as the law will not infer from the nature of the words themselves.' And again, 'the plaintiff must show that his character has suffered from defendant's false assertions, and he can only show this by giving evidence of some special damage.' Newell on Defamation, etc., p. 849. 'Loss of customers is special damage, and must be specifically alleged, and the customers' names stated. An indefinite loss of business is considered general damages, and can only be proved where the words are spoken of the plaintiff in the way of his trade, and, then, are actionable in themselves.' Newell on Defamation, Sec. 43, p. 868; Newell on Defamation, p. 634, Sec. 49; Odger on Slander and Libel, star pages, 302, 303.

"And to pleadings, it is held: 'When a publication is not libelous per se, special damages must be alleged and proven in order to sustain the action.' *Bank v. Bowdre Bros.*, 8 Pick., 734, 735; Townsend on Libel and Slander, p. 580, Sec. 345; Newell on Defamation, p. 856, Secs. 28, 29, p. 866, Sec. 39; 13 Am. & Eng. Enc. L., p. 435; Sutherland on Damages, Sec. 1215. 'An allegation stating generally that, in consequence of the defendant's words, plaintiff has lost a large sum of money, or that his practice or business has declined, is not sufficiently precise.' Newell on Defamation, etc., p. 869, Sec. 41; Odgers on Slander and Libel, star page, 302. 'The names of the persons who had ceased to employ plaintiff, or who would have commenced to deal with him had not the defendant dissuaded them, should be set out in the statement, and they themselves called, as witnesses, at the trial to state their reasons for not dealing with plaintiff, for their withholding custom may be due to other causes. If the

plaintiff cannot give the names of those who have ceased to deal with him, and cannot prove that their ceasing to deal with him is due to defendant's words, he must fail in the suit, although there has been a falling off in his business.' Newell on Defamation, p. 867, Sec. 41. Special damage must be explicitly claimed in the pleadings and proven at the trial, and the plaintiff is confined to his special damage laid, and he must prove them as laid, or fail in his suit, and there are no general damages to which he can have recourse, and the jury will be confined to such special damage as is shown by the pleadings and evidence. They cannot lawfully compensate the plaintiff for pain, mental anxiety, or general loss of reputation in cases where the words are not actionable themselves, but must confine the assessment to the actual pecuniary loss strictly as alleged and proved.' Newell on Defamation, Sec. 39, p. 866; 3 Sutherland on Damages, Sec. 1215; Odgers on Slander and Libel, star page, 302. 'The damage must be alleged with so much of certainty that the defendant may be able to contradict it if untrue.' Newell on Defamation, 866, Sec. 40."

The narrow rule stated in the *Fry* case has been cited with approval and followed in the more recent case of *Smith v. Fielding*, 205 Tenn. 313, 326 S.W. 2d 476, where the Court stated:

"It is clearly pointed out in the *Fry* case, *supra*, that special damages mean just exactly what the term indicates. That is, the pleader must be specific as to the amount of money lost or the amount of declining business, the names of the individuals who have ceased to deal with the plaintiff, etc."

The plaintiff has here shown publication of the defamatory letter by the defendant having mailed it to all of the plaintiff's customers. The plaintiff has further introduced evidence both of a general decline in its business following the publication of the defamation, inter and evidence of specific expenditures made in an effort to mitigate or overcome the injurious consequences of the letter. With respect to the evidence of general decline in its volume of business the plaintiff has shown not only its gross loss of business but also its net loss of profit incident to such decline. The major portion of the decline in business and loss of profits was in an area not involved in the patent lawsuit, thus indicating that the loss of business was not the result of any threatened involvement of the customers in the patent action. The plaintiff has further shown that at least five of its customers were influenced upon receiving the defamatory letter to write or call upon the plaintiff to explain, three of which customers make specific reference to the defamatory portion of the defendant's letter, wherein the letter stated that the customer's name had been given the defendant by Mr. Livingstone and the letter was being written to the customer with his knowledge. (See Exhibits 11, 12, 13, 14, and the testimony of Stanley Livingstone and E. S. Belshear.) The plaintiff has shown that it incurred expense in the sum of $25.00 in writing letters to all of its customers in an effort to explain and mitigate the effect of the defamatory letter and that it spent $814.36 upon travel expenses in calling upon 32 of its 60 customers, being the more important customers, in an effort to explain and mitigate the effect of the letter, including $331.75 in calling upon two specific customers, Levi and Pepperell, its best customers.

While there is evidence upon which a jury might find that the defamation was the proximate cause of a general

loss of business to the plaintiff, the Court is of the opinion that under the special damage rule of *Fry v. McCord Bros.*, *supra*, evidence of a general loss of profits is insufficient to base a verdict upon in an action for libel per quod. A recovery may be based only upon proof of specific losses in reference to specific customers. The rule denying consideration to proof of general damages and permitting consideration only of evidence of special damages in an action of libel per quod, while permitting consideration of general damages in an action of libel per se, appears to have its roots in history and not in reason. The rule cannot be justified upon any logical basis. See "Libel Per Se and Special Damages," 13 Vand. L.R. 730. See also *McCormick on Damages*, Sec. 113. As stated in *Ratcliff v. Evans*, L.R. (1892) 2 Q.B. 525, the rule often involves "an absolute denial of justice and of redress for the very mischief which was intended to be committed" and, as stated by Prosser in his excellent treatise upon torts, it often leaves "a serious and genuine wrong entirely without any practical remedy." *Prosser on Torts*, 3rd Ed., p. 946. This Court is compelled to follow the law as established by the court of Tennessee in this regard, however.

Disregarding the plaintiff's evidence of general loss of profits, there remains evidence of specific expenditures by the plaintiff to the extent of $839.36 in overcoming or avoiding the effect of the libelous letter with respect to certain customers. Such evidence would constitute proof of special damages. There being evidence of special damage in the record, the Court is of the opinion that the motion for judgment n.o.v. should be overruled.

Considering next the defendant's motion for new trial, in light of the statement in *Fry v. McCord Bros.*, *supra*, that "the jury will be confined to such special damage as

is shown in the pleading and evidence," the Court is of the opinion that the verdict as to compensatory damage must be set aside and a new trial granted thereon. The Court is of the further opinion that the verdict as to punitive damages must in turn be set aside as excessive and a new trial likewise granted thereon. The new trial, however, will be limited to the issues of compensatory and punitive damages only, the verdict of the jury being permitted to stand with regard to all other issues in the case. Having considered each remaining ground in the motion for new trial, the Court is of the opinion that the motion should be overruled as to each remaining ground. The requested jury charges complained of were either adequately covered in the charge or were properly declined. With regard to the verdict, the verdict was announced orally by the foreman in open court and each juror assented to the correctness of the verdict as announced by the foreman. Thereafter it appeared that there was a discrepancy in the written verdict form as filled out by the foreman and the oral verdict as reported and approved with reference to the amount of punitive damages. The award of punitive damages was announced in the sum of $50,000.00 by the foreman and each of the twelve jurors assented to this in their verdict. The foreman, however, in filling out the written verdict form had inserted the figure 50.00. The foreman had made a similar error in reporting on the written verdict form the compensatory damages, the oral verdict approved by the jury being in the sum of $20,000.00 and the written verdict being in the sum of 20.00, but this was immediately corrected by the foreman in the presence of all jurors and assented to by all jurors. Likewise, the fact that the 50.00 was a clerical error on the written verdict form was confirmed by all twelve jurors. An oral verdict is the legal form for reporting a verdict at common law.

53 *Am. Jur.*, Trials, Sec. 1009. Clerical errors on the written verdict form would not affect the validity of the oral verdict nor prevent the correction of the clerical errors.

An order will enter accordingly.

FRANK W. WILSON
United States District Judge

[Caption Omitted]

OPINION

(Filed December 22, 1965)

This case has a lengthy history. It is a libel action which arose out of a patent suit initially filed in 1955. The patent suit has long since been disposed of. In the course of the patent litigation, however, the plaintiff in this action, Electric Furnace Corporation, contended that it was defamed by a letter written to its customers by an officer of the defendant, Deering-Milliken Research Corporation. This libel action has now been tried three times before three different juries. Upon the initial trial the jury returned a verdict for the plaintiff, awarding compensatory damages in the sum of $6420.00 and punitive damages in the sum of $12,500.00. Upon appeal, although no error was found upon the issue of liability, the verdict was set aside upon the ground that the proof of damages was in-

sufficient, 325 F. 2d 761. Upon a second trial of the libel action, the jury returned a verdict for the plaintiff, awarding compensatory damages in the sum of $20,000.00 and punitive damages in the sum of $50,000.00. This Court, for reasons set forth in opinions filed upon March 16, 1965, and June 4, 1965, granted a new trial after the plaintiff had declined to accept a remittitur suggested by the Court in both compensatory and punitive damages. Upon a third trial of the case, the jury returned a verdict for the plaintiff, awarding compensatory damages in the sum of $2,000.00 and punitive damages in the sum of $60,000.00. A motion for judgment n.o.v. and a motion for new trial, together with an amended motion for new trial, has now been filed by the defendant with respect to this third trial.

Having considered the defendant's motion for judgment n.o.v. and motion for new trial, as amended, the Court is of the opinion that the said motion should be overruled with respect to each ground thereof, with exception hereafter noted. The evidence in all three trials upon the issue of liability has been substantially the same. No error was found by the Court of Appeals with respect to the issue of liability upon the initial trial. Likewise, this Court found no error with respect to the issue of liability upon the second trial and is of the opinion that no error exists with respect to the issue of liability upon the third trial, all for the reasons heretofore set forth in the former opinions in this case.

With respect to the issue of damages, the evidence upon the third trial was substantially the same as the evidence introduced upon the second trial. Mr. Livingstone testified upon the third trial to specific expenditures by the plaintiff in the sum of $834.36, including $20.00 spent in writing letters to all of its customers to whom the libelous

letter was sent and $814.36 spent on travel expenses in going to see its more important customers in an effort to explain and mitigate the damaging effect of the libelous letter. Further evidence of a general loss of profits was offered by the plaintiff, but was excluded by the Court upon the ground that a general loss of profits is insufficient to base a verdict upon under the law of Tennessee in an action for libel per quod, proof of special damages only being allowed in such an action. *Fry v. McCord*, 95 Tenn. 678. For a further discussion of the issue of damages in this case and the law of Tennessee with respect to damages in an action for libel per quod, the Court refers to and adopts its former opinion, filed March 16, 1965 upon conclusion of the second trial of this case. For the reasons set forth in that opinion and on the basis of the record made upon the third trial of this case, the Court is of the opinion that the motion for judgment n.o.v. should be overruled. As stated by the Court in its former opinion:

> "Disregarding the plaintiff's evidence of general loss of profits, there remains evidence of specific expenditures by the plaintiff to the extent of $839.36 in overcoming or avoiding the effect of the libelous letter with respect to certain customers. Such evidence would constitute proof of special damages. There being evidence of special damages in the record, the Court is of the opinion that the motion for judgment n.o.v. should be overruled." (There was a difference of $5.00 in the testimony upon the second and third trial with respect to the cost of letters sent out to customers, the sum of $25.00 having been testified to on the second trial and the sum of $20.00 having been testified to on the third trial.)

While the Court is of the opinion that evidence of special damages does exist in the record, it is the further opinion of the Court that the only evidence in the record of special damages is in the total sum of $834.36. As stated in its former opinion upon the second trial, the Court is now even more keenly aware that this litigation has become most protracted, has become burdensome to the parties, and should be decided without a further or fourth trial, if it can be decided in accordance with the law and with justice to the parties. Accordingly, the Court will suggest that a remittitur in compensatory damages be made from the sum of $2000.00 to the sum of $834.36.

With respect to punitive damages, this Court is of the opinion that the award for punitive damages is also excessive. However, two juries upon substantially the same evidence have awarded $50,000.00 and $60.000.00 respectively as punitive damages. The conduct of Dr. Armitage in writing a letter to all customers of Electric Furnace Corporation, after compelling disclosure of their names by legal process in the patent litigation and including within that letter a statement that their names had been furnished by Mr. Livingstone and that he, Livingstone, knew that the letter was being sent, could properly be viewed by the jury as a deliberate, malicious, and willful attempt to destroy the confidence of the customers in the plaintiff and in Mr. Livingstone, its president. This is especially so when it appears undisputed that such language was included in the letter over the specific and strenuous objection of Mr. Livingstone and his explanation that he had promised his customers their names would not be disclosed and that they would be protected from patent litigation or harassment and that to include the objectionable language would utterly destroy the customers' confidence and good will. Under these circumstances, and in view of the fact

that the statement was unnecessary to any legitimate purpose which the defendant might have in notifying such customers of its patent rights and claims, the conduct of Dr. Armitage could properly be viewed by the jury as deliberately and maliciously seeking to do just what the plaintiff accused him of doing—that is, by deliberate and malicious use of defamation seeking to destroy the plaintiff's business. In view of the fact that two juries have now awarded punitive damages in the sum of $50,000.00 or above, the Court will accordingly suggest a remittitur of $10,000.00 in the award of punitive damages, allowing an award of punitive damages in the sum of $50,000.00 to stand.

Should the plaintiff not elect to accept the remittitur as herein suggested, it will be necessary to grant a new trial upon all issues. Should the plaintiff elect to accept the remittitur as herein suggested, the defendant's motion for a new trial will be overruled. The entry of an order upon this opinion will await the filing within ten (10) days of written notice of the plaintiff of its election to accept the remittitur as herein suggested.

/s/ FRANK W. WILSON,
United States District Judge

Nos. 17100 and 17101

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ELECTRIC FURNACE CORPORATION,
Plaintiff-Appellee and
Plaintiff Cross-Appellant,

v.

DEERING MILLIKEN RESEARCH CORPORATION,
Defendant-Appellant and
Defendant Cross-Appellee.

APPEAL from the U. S. District Court for the Eastern District of Tennessee

FILED
October 4, 1967

Decided October 4, 1967.

Before O'SULLIVAN, CELEBREZZE and PECK, Circuit Judges.

O'SULLIVAN, Circuit Judge. We consider here the appeal of Deering Milliken Research Corporation, (Deering), defendant in a libel action, from a judgment for plaintiff, Electric Furnace Corporation, (Electric), awarding plaintiff-appellee $834.36 compensatory and $50,000 punitive damages. Judgment was entered after the District Court reduced, as excessive, a jury's verdict, returned July 30, 1965, for $2,000 compensatory and $60,000 punitive damages.

This judgment was the product of the third trial of this lawsuit. The outcome of the first trial in which a jury awarded $6,420 compensatory and $12,500 punitive damages to Electric, was reversed by this Court in *Electric Furnace Corp. v. Deering Milliken Research Corp.*, 325 F(2) 761 (CA 6, 1963). We there remanded the case for a new trial, and following a second trial a jury again found in favor of the plaintiff, awarding it $20,000 compensatory and $50,000 punitive damages. Upon Deering's motion, the District Judge thereupon ordered a new trial, unless plaintiff would accept a reduction of the compensatory damages to $839.36 and the punitive damages to $25,000. Plaintiff elected not to accept the ordered remittitur, and the third trial ensued.

Defendant-appellant's motions for a directed verdict at the close of plaintiff's case in this last trial and at the close of proofs, and its motion for judgment n.o.v., were overruled. But upon its motion for new trial the District Judge ordered the above mentioned reduction of the jury's awards of compensatory and punitive damages, and this time the plaintiff accepted the suggested remittitur; judgment was entered on December 27, 1965. It is this final judgment which is now before us on appeal.

In our earlier opinion, 325 F(2) 761-766, we held that a letter written on September 6, 1955, by Deering Milliken to a list of Electric Furnace's customers was not libelous per se, but could be found to be libelous per quod; but we observed that "libel per quod standing alone without proof of actual damages, proximately caused by the libel, will not support a verdict for the plaintiff." 325 F(2) at 765. Judge Cecil, author of our opinion, went on to review plaintiff's evidence on damages, and concluded,

> "We conclude that there is a failure to offer any evidence to prove that Electric Furnace suffered any

damages as a proximate result of the alleged libelous letter. Since punitive damages, even though actual malice may exist, cannot be allowed in an action for libel per quod, unless there is proof of actual damages there is no support for the verdict of the jury." 325 F(2d) at 766.

Notwithstanding plaintiff's failure then to sustain its burden of proof of actual damages, we elected, pursuant to 28 U.S.C. §2106, not to direct entry of a judgment for defendant, but remanded the case for a new trial. Plaintiff was, therefore, given opportunity at a new trial to offer such proof. Our review of the third trial persuades us that plaintiff did not offer such proof. We now reverse and remand for entry of judgment for defendant.

Our former opinion, 325 F(2) 761, sets out at adequate length the background of this litigation, the evidence then offered by plaintiff on its attempt to prevail, and the law which governs. We repeat here only to the extent necessary to expose our current view. The litigation began as a suit by Deering in 1955, charging Electric with patent infringement. While the case was pending, Deering obtained, by its production at the taking of a deposition of Electric's president, Stanley Livingstone, a list of concerns for whom Electric was doing work—employing a chemical process—which allegedly infringed Deering's patent. Thereafter, in late August of 1956, Livingstone and the president of Deering, Dr. Armitage, met to discuss the pending patent case. At this meeting Dr. Armitage showed Mr. Livingstone a copy of a letter which Deering proposed to mail to Electric's customers. The general purport of the letter was to notify these customers that Electric was infringing Deering's patent in the process it was using in serving them. The first paragraph of the letter said:

"We have learned from Mr. Stanley Livingstone, President of Electric Furnace Corporation, Chattanooga, Tennessee, that you have used the services of Electric Furnace Corporation in obtaining filling grates coated with TEFLON for use in your mill, and Mr. Livingstone knows that we are writing directly to you."

Livingstone objected to Armitage's plan to send this letter, calling attention to a letter which had been written by Livingstone some two years earlier, on July 31, 1954, wherein Electric adivsed its customers, anent Deering's claims concerning the alleged infringement of its patent, that Electric would defend at its cost any suit for infringement or royalties brought against its customers; the letter further stated that "we do not disclose the identity of our customers." Livingstone said that the above language was tantamount to a promise by his company not to give out the names of its customers; and that Armitage's proposed letter could be construed as telling Electric's customers that it had voluntarily given their names to Deering in breach of its 1954 promise. There is no evidence that Armitage agreed or led Livingstone to believe that the letter would not be sent, and such a letter was sent on or about September 6, 1956, to each of Electric's customers.

This present litigation then began by Electric's filing of a cross-complaint in the patent case, charging that Deering had libelled it by sending out the September 6, 1956 letter. Electric's charge of libel resides in its claim that the accused letter implied that Electric had broken a promise with its customers and thus defamed and degraded it in their eyes, and in the industry where it was known.

In our former opinion, we went along to the extent of holding that a jury could find that the letter was libelous

per quod, but that "libel per quod standing alone without proof of actual damages, proximately caused by the libel, will not support a verdict for the plaintiff." We recited the authorities which supported our view of the law and we need not here restate Judge Cecil's lucid exposition of the law and his extensive citation of the authorities supporting our conclusion. What he there said is now the law of this case, but independently of such rule, we are satisfied that a fresh examination of applicable authorities would not lead us now to any different conclusions. The evidence offered and admitted at the third trial gave no more support to plaintiff's case than that which made up the record at the first trial. Plaintiff-appellee's current address to us does not contend otherwise.

The fatal deficiency in plaintiff's case resides in its failure to show that any recipient of the accused letter gave it the meaning which Electric asserts is fairly inferable from a reading of it. There was no evidence from any of such recipients which indicated that Electric was in fact defamed or degraded by the letter, and especially, there was no evidence that Electric suffered any actual or special damages by way of loss of business which could be attributed to the allegedly libelous letter. In our first opinion we said,

> "While Mr. Livingstone had some responses from customers concerning his letter of July 31, 1954, not one customer said that it had discontinued business with the plaintiff because of any breach of promise by Mr. Livingstone or any misrepresentation made by him on behalf of the Electric Furnace Corporation.
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> * * * * * *

"The evidence fails to show that any business was lost due to any libelous phase of the letter of September 1956. *The customers themselves could have cleared up this missing link in the proof.*" (Emphasis supplied.) 325 F(2d) at 766.

Our suggestion of a method of providing the "missing link" in the proofs was not followed: no relevant testimony by any customer was provided at the third trial. Throughout the trial plaintiff's counsel, by various observations, hinted that his inability to prove actual and special damages was a reluctance of Electric's customers to come forth with the necessary testimony, a reluctance produced by their unwillingness to oppose the presumably powerful defendant. There is nothing in the record, however, to support such a theory. It was also intimated that such customers and their executives were beyond the reach of the trial court's subpoena, but even if that were so, no effort was made to obtain the needed evidence by depositions or otherwise. As indicated in our first opinion, there was evidence that Electric's business was experiencing some dropping off and that the accused letter intervened in the period of this decline, but a mere showing of such decline is not enough where the accused statements cannot be regarded as libelous per se. That the plaintiff made no better case of actual damages than on the first trial is demonstrated by the fact that the District Judge at the conclusion of both the second and third trials reduced the award of compensatory damages to the amount of expense plaintiff claimed it incurred in an effort to regain its customer's goodwill following the sending of the allegedly libelous letter.

We turn then to the central issue: whether the compensatory damages which the District Court allowed as recoverable under the proofs in the sum of $834.36, and which were

accepted as justifying the jury's award of punitive damages in the sum of $60,000, reduced as excessive to the figure of $50,000, can be regarded as "special damages" caused by Deering's letter, that will support the judgment below. The figure of $834.36 was made up mainly of travel expenses in the amount of $814.36; Mr. Livingstone testified he incurred these expenses in visiting Electric's customers to reestablish his and his company's standing, following the sending of the allegedly libelous letter. The $20.00 balance was the cost to Electric in preparing and mailing certain mimeographed letters to Electric's customers. These were apparently copies of a letter which Livingstone had sent to Deering under date of September 12, 1956, protesting the sending out by Deering of the September 5 letter; in this letter Livingstone declared that he had not voluntarily given Deering the list of customers and averred that "the reaction of the mills to your [September 5] letter establishes the fact that the false implication has damaged this status [Electric's good will] materially." The letter demanded that Deering retract its letter and threatened suit if that was not done. Deering sent no retracting letter.

We deal first with whether Electric's proofs of travel expense overcame the vice which we found in our first opinion. We there held that such expenses did not qualify as proof of special damages, saying that "[t]here is no breakdown of these expenses to show what part of them, if any, were not routine travelling expenses." 325 F(2) at 766.

The evidence showed that it was a usual practice for Mr. Livingstone to visit Electric's customers in the last quarter in each year. In 1955, for example, he had incurred $900 to $1,000 worth of travel expenses in making the customary fall trip, although he claimed that was on

"boiler business." As to the 1956 trip, Mr. Livingstone testified, "Well, during the following three months I undertook to call on the more important of our customers, and I traveled, in part, these were exclusively traveling expenses to try and salvage my former position with these customers." On cross-examination, however, he testified that on this trip he discussed with his customers other business than that involved in the patent dispute "to a very limited extent"; and to a further question, he conceded that it was very likely that he discussed other business to some extent, concluding that "it was so long ago I can't state accurately * * * I can't recall at this late date what the discussion was at each trip." He further admitted that it was not anything new for him to travel on business for his company in the months of September, October and November. There was no testimony that, but for Deering's libelous letter, Livingstone would not have taken his usual fall trip to visit Electric's customers—a trip which involved substantially the same costs he incurred the preceding year. We cannot escape the conclusion that the third trial proofs of Livingstone's travel expenses did not, any better than those proofs presented at the first trial, identify these expenses as being the consequence of the libelous letter.

We believe, however, that there is a more important reason for holding that these expenses did not make out the actual or special damages necessary to make actionable that which is only libelous per quod. There was no evidence that Electric's standing with any of its customers was injured by the Deering letter. There was a total lack of proof that Electric lost any business *because* of that letter. In our first opinion we cited the case of *Fry v. McCord Bros.*, 95 Tenn. 678, 33 S.W. 568 (1895) as authority for the proposition that such proof was necessary to support a verdict in an action for libel per quod. The

court there expressed the relevant aspects of Tennessee law which govern this case; quoting in part from various authorities, it said:

> "'the plaintiff must show that his character has suffered from defendant's false assertions, and he can only show this by giving evidence of some special damage.'
>
> * * * * * *
>
> "As to pleadings, it is held: 'When a publication is not libelous per se, special damages must be alleged and proven in order to sustain the action.'
>
> * * * * * *
>
> "'If the plaintiff cannot give the names of those who have ceased to deal with him, *and cannot prove that their ceasing to deal with him is due to defendant's words*, he must fail in the suit, although there has been a falling off of his business.'
>
> * * * * * *
>
> "They cannot lawfully compensate the plaintiff for pain, mental anxiety, or general loss of reputation in cases where the words are not actionable themselves, but must confine the assessment to the actual pecuniary loss strictly as alleged and proved.'" 95 Tenn. at 688, 689. (Emphasis supplied.)

It is of course familiar law that a plaintiff can recoup expenses incurred in an effort to minimize damages flowing from a tort. But here the *sine qua non* of a libel per quod action—proof of actual and special damages suffered as the result of an alleged libel—is missing. There is, in effect, no tort demonstrated. We do not think, consequently, that Electric could create a cause of action or provide a basis for an award of damages by having Mr. Livingstone take a trip which included in its purposes the

overcoming of damages which were not shown to have been inflicted; the expenses incurred thereby are not recoverable.

A clear statement of the rule we apply is contained in *Bigelow v. Brumley*, 138 Ohio St. 574, 37 NE(2) 584 (1941). There a plaintiff attempted to establish the needed proof of special damages in an action for libel per quod by proving expenses incurred in attempting to refute the statement. The Ohio Court said:

> "We are satisfied that this item of special damage is not sufficient to make the statement defamatory *per quod* if not otherwise actionable. Plaintiff's allegations do not show any loss or injury actually suffered as a direct consequence of an impaired reputation. They at most show that plaintiff was apprehensive lest, as a result of the statement concerning him, some third persons *might* alter their relations with him to his disadvantage, and not that any third persons in fact did. As stated in 3 Restatement of Torts, 185, Section 575, comment b, special damage 'must result from conduct of a person other than the defamer or the one defamed * * * .' Here the only special harm alleged is entirely the result of the plaintiff's own conduct in causing money to be expended to deny and refute the statement. The plaintiff in a libel action has the right to try to mitigate damages, and, if his cause of action can be independently established, may recover for sums reasonably expended in this effort. But he may not pull himself up by his own boot straps, and by such expenditures create a cause of action for himself where one did not otherwise exist. *Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publishing Assn.*, 226 N.Y. 1, 122 N.E. 463." 138 Ohio St. at 594.

In *Pollard v. Lyon*, 91 U.S. 225, 23 L. Ed. 308 (1876), where the alleged slanderous words were not actionable per se, the Supreme Court observed:

> "In such a case, it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. Cook v. Cook, 100 Mass. 194." 23 L. Ed. at 314.

Approval of this rule is found in the text of *Prosser, Torts, Defamation*, § 93, pp. 593-4 (2nd Ed. 1955), and 53 C.J.S., *Libel and Slander*, § 240, p. 364 (1948).

Defendant-appellant raises other questions which we need not consider in view of our disposition of the case.

The plaintiff-appellee filed a cross-appeal asserting that the District Judge erred in granting a new trial after the second trial. The jury had rendered a verdict made up of $20,000 compensatory and $50,000 punitive damages. The District Judge, as a condition of denial of defendant's motion for new trial, ordered a remittitur of all but $839.36 of the compensatory and $25,000 of the punitive. Plaintiff declined to accept the remittitur and the third trial ensued. It is not necessary to consider the procedural propriety of plaintiff's cross-appeal. The record supporting the cross-appeal does not indicate that the second trial presented any different case than the third trial upon which we hold that a judgment should have been directed for defendant. We likewise consider that the District Judge's holding that the jury verdict, at the second trial, was excessive was within his discretion, and that such discretion was not abused.

The judgment is reversed and the cause remanded for entry of judgment for defendant on the merits, notwithstanding the verdict of the jury.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,100

ELECTRIC FURNACE CORPORATION,
Plaintiff-Appellee,

vs.

DEERING MILLIKEN RESEARCH CORPORATION,
Defendant-Appellant.

BEFORE: O'SULLIVAN, CELEBREZZE and PECK, Circuit Judges.

JUDGMENT

(Filed October 4, 1967)

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for entry of judgment for defendant on the merits, notwithstanding the verdict of the jury.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

Issued as Mandate: November 14, 1967

COSTS: To be recovered by Appellant

Filing fee	$25.00
Printing	$-----
Total	$25.00

A True Copy.

Attest:

/s/ Carl W. Reuss
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,101

ELECTRIC FURNACE CORPORATION,
Plaintiff Cross Appellant,

vs.

DEERING MILLIKEN RESEARCH CORPORATION,
Defendant Cross Appellee.

BEFORE: O'SULLIVAN, CELEBREZZE and PECK,
Circuit Judges.

JUDGMENT

(Filed October 4, 1967)

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the cross-appeal of the plaintiff, Electric Furnace Corporation, be and it is hereby dismissed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

Court of Appeals Judgment 10/4/67

Issued as Mandate: November 14, 1967

COSTS: NONE

Filing fee .....$----
Printing .....$----

Total $----

A True Copy.

Attest:

/s/ Carl W. Reuss
Carl W. Reuss, Clerk

Nos. 17,100--17,101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELECTRIC FURNACE CORPORATION, *Plaintiff-Appellee*,

v.

DEERING MILLIKEN RESEARCH CORP., *Defendant-Appellant*.

ORDER

FILED
November 2, 1967

Before O'SULLIVAN, CELEBREZZE and PECK, Circuit Judges.

Upon due consideration thereof,

IT IS ORDERED that the petition for rehearing filed by the plaintiff, Electric Furnace Corporation, be, and it is, hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

CONSTITUTION OF THE UNITED STATES OF AMERICA, AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 38(a)

Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 43(a)

Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

EXCERPT FROM TRANSCRIPT OF TESTIMONY OF TRIAL OF JULY 29-30, 1965

[167] THE COURT: Mr. Chambliss, isn't that case really dealing with two rules of law relating to libel per se? One rule of law is that in order to be libel per se it must reflect upon the business character, reputation, and so forth. The second rule of libel per se is libel must appear upon the face of the instrument. Unless both of those conditions exist, you do not have a libel per se. Now, of course if you are correct in your interpretation of the case, then you are entitled to your judgment taken in the previous trial of this case, and if you take your appeal in that case, you would be entitled to have your judgment in that previous trial, because the Court would not have granted a remittitur on compensatory damages if your contention is correct. Rather, the judgment of compensatory damages would have been allowed to stand, and if the judgment of compensatory damages had been allowed to stand, the Court would also have allowed the judgment for punitive damages to stand. So, that if your contention with regard to the Fry versus McCord case —the Court certainly agrees with you is unfortunate law from the Court's viewpoint, and not good law in the sense of rendering justice as the Court thinks justice should be administered, it is the law of Tennessee. The Court is of the opinion that case applies here.

* * *